# No. 15,082

# United States Court of Appeals

## For the Ninth Circuit

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CITY OF ANCHORAGE, a Corporation,
*Appellant,*

vs.

RICHARDSON VISTA CORPORATION and
PANORAMIC VIEW CORPORATION,
*Appellees.*

**Appeal from the District Court for the District of Alaska, Third Division.**

## PETITION OF THE APPELLEE, RICHARDSON VISTA CORPORATION, FOR A REHEARING.

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*To the Honorable William Denman, Chief Judge, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:*

The Appellee, Richardson Vista Corporation, petitions in the United States Court of Appeals for rehearing in this matter. The Court of Appeals, on February 21, 1957, reversed the District Court judgment and remanded the cause, with directions to enter judgment in favor of the Appellant, City of Anchorage.

The Court of Appeals must have mistakenly believed that Appellees were unscrupulously attempting to take advantage of an inadvertent oversight amounting to an implied repeal of an ordinance; otherwise it is difficult to understand why the court went to such lengths to define "establishment" in the manner in which it did. Petitioner therefore emphatically states, at the outset of this petition, that the Appellees are not sharpshooters attempting to take advantage of an unconscious mistake or error, but on the contrary have been fair, open, and aboveboard in their dealings with the City of Anchorage and want only the benefit of the clear, unambiguous tariff upon which they relied in 1949 and thereafter, making payments under clear, fully explained, protest when the City declined to classify them properly.

The following grounds for rehearing are urged by the petitioner, Richardson Vista Corporation:

**POINT I.**

**APPELLATE COURT'S MAJOR PREMISE WAS IN ERROR, AS PRIOR ORDINANCE WAS NOT REPEALED INADVERTENTLY OR BY IMPLICATION, BUT WAS EXPRESSLY REPEALED, AND THAT FACT WAS BROUGHT FORCEFULLY TO THE ATTENTION OF THE COURT AND ALL PARTIES BEFORE TRIAL.**

The case involves the construction of an electricity rate tariff published by the City of Anchorage. In its opinion, the Court of Appeals was under the erroneous impression that City Ordinance No. 55 (Ex. I), which dealt with combining the readings of separate

meters (Sec. 24 of Ord. 55 or Ex. I), had been repealed by implication rather than expressly, and that the repeal was almost inadvertent.

The Court of Appeals, at Page 5, states: "Apparently, all the parties thought Ordinance No. 55 (original rate structure, rules and regulations adopted by the City in 1925 and repealed by implication by the adoption of Ordinance 283 in 1949) was still in effect". [Note that the Appellate Court is further mistaken: Ord. 55 or Ex. I did not establish any rate structure or contain any rules and regulations.]

Again, at the top of Page 6, in summarizing Judge Folta's opinion, the Court of Appeals states that the provisions of Ordinance No. 55 "were inadvertently repealed", and at Page 8 the court refers again to the repeal of the ordinance "by implication" and to the "repealing effect of Ordinance No. 283".

There was nothing inadvertent about the repeal of the applicable provisions of Ordinance 55. Section A-6 of Ordinance 283 (Exhibit 10) states:

> "A-6 repeal. The following ordinances are hereby repealed: . . .
>
> (a) . . .
>
> (b) Sections 7 to 29 inclusive of Ordinance #55, dated 2 September, 1925". (See R. 356 *et seq.*)
>
> (c) . . ."

The title of Ordinance 283 likewise refers to: "repealing . . . Sections 7 to 29 inclusive, of Ordinance No. 55."

As for the belief of the Court of Appeals that all the parties thought Ordinance 55 was still in effect, the following occurred at the pre-trial conference in District Court (R. 127, 128):

> "The Court. You mean it's some ordinance that contains these rules and regulations? Is that what you offer?
>
> Mr. Rader. Yes.
>
> The Court. It will be admitted in evidence. I don't know why you should quibble over that.
>
> Mr. Hellenthal. I know it was repealed. That is why I am quibbling over it. I know Ordinance 55 was repealed in 1949, if that is what it is. I haven't seen it, but I strongly suspect it is Ordinance 55.
>
> Mr. Rader. If it please the Court, I meant to say, if I didn't say, that (it) should be offered for identification because I know there will be an argument as to its repeal and whether or not it is still effective."

Judge Folta then stated:

> "There is no use in marking it for identification. It will be marked as an Exhibit just as any other exhibit in the case. Even though it was repealed, it probably would apply to at least part of the period." [The trial judge was, of course, mistaken in this belief.]

The court's finding of a long-term continuing policy is predicated on an implied or inadvertent repeal of a portion of Ordinance 55. It cannot be otherwise. If after an express repeal, the council can conceal its subsequent mistakes through a unilateral declaration of "policy" manifest injustice would result, as it has here.

When it becomes apparent that the repeal of applicable sections of Ordinance 55 was express there is no need for discussing "policy". The sole remaining question is—Does petitioner fall within the applicable tariff, or Schedule C? Thus, the appellate court would not have labored over the matter of the existence or non-existence of a policy had it not made the initial error.

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**POINT II.**

**APPELLATE COURT WAS MISTAKEN IN ASSUMING THE EXISTENCE OF A POLICY PROHIBITING COMBINED BILLING.**

The Court of Appeals, in its opinion, assumes that not permitting the combining of meter readings for common areas at petitioner's apartment project was a matter of long-standing policy on the part of the City of Anchorage.

The only actual relevance of Ordinance 55 to the case is to explain that the practice which the City had followed from 1925 until 1949 was not a matter of policy, but merely compliance with City law. The Court of Appeals, in its opinion at Page 8, said, "to overcome this established policy, there should be some definite proof of the City's intention to depart therefrom", and at Page 16, the Court of Appeals said, "this interpretation followed the practice of many years . . ."

Actually, the pertinent section of Ordinance 55 was repealed on August 24, 1949 (R. 356). A few weeks

later, ground was broken for the construction of petitioner's housing project, and in August of 1951 the first tenants occupied apartments (R. 189). The following month petitioner was billed by the City for the electricity consumed in the common areas of petitioner's apartment buildings. Petitioner immediately protested to the City, and when its protest was denied, it filed this action against the City to compel compliance with the published tariff.

The Court of Appeals, in rendering its decision, had not been enlightened of the fact that only 23 months—and not 26 years—had gone by between the repeal of most of Ordinance 55 and the commencement of petitioner's use of electricity. The record is devoid of any evidence whatsoever of a City policy being established during that 23-month period. In fact, it would have been impossible for such a policy to have been established other than by ordinance or regulation, since petitioner's was the first apartment project to be energized in the City of Anchorage during this period. The only similar project in Anchorage had been energized in 1946, before the repeal of the prohibition contained in Ordinance 55 (R. 366).

In summary, there was no city policy prohibiting combined billing because there was no opportunity to establish any policy until petitioner's apartment project was constructed.

## POINT III.

### APPELLATE COURT SAYS CITY MANAGER FORBADE COMBINED READING WHEN IN FACT MANAGER ENCOURAGED PRACTICE.

The Court of Appeals, in its decision, was under the misapprehension that the City Manager had interpreted the electrical tariff as forbidding combined meter readings. Opinion, Page 16: ". . . and in fact was the interpretation of the council speaking through its agent, the City Manager".

Actually, the City Manager, Mr. Sharp, according to all the evidence, gave just a contrary interpretation, "I was assured by Mr. Sharp that we would be treated as one customer . . ." (R. 203). Mr. Sharp was never produced as a witness to refute this testimony, nor was his absence explained by the City. Thus again the Appellate Court is mistaken in assuming that a prior policy existed.

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## POINT IV.

### COURT OF APPEALS OVERLOOKED ORDINANCE PROVISION WHICH ESTABLISHED FIXED METHOD FOR MAKING RULES AND REGULATIONS.

The Court of Appeals held that rules, regulations, and practices supplementing and implementing the printed Schedule C were adopted informally by the City's construction of its own ordinance. "Whether it did this in council meeting or by acquiescence in the interpretation of the City Manager is immaterial". (Op. Page 16). After the litigation was commenced, various city managers subsequent to Mr. Sharp, have

stated that either the National Electrical Safety Code, which was contained in the part of Ordinance 55 that was not repealed by Ordinance 283 (Ex. 10), or Schedule C prohibited petitioner's right to combined meter billings. The opinion of the Court of Appeals, however, ignores Chapter 1, Article 2, Section 206.1 of the Anchorage General Code which provides:

> "Section 206. Publication of Rules and Regulations.
>
> 206.1. All rules and regulations made by any administrative officer subject to approval by the Council under the provisions of this Code shall be published either by one publication in a newspaper of general circulation in the City or by posting a copy thereof for ten days following their approval by the Council on the city bulletin board in the lobby of the City Hall."

If a regulation could be made "by acquiescence", the public would be faced with an impossible instability in City government. Rules and regulations could be passed by informal council action, and the only persons aware of them would be those in attendance. Laws would be subject to change by self-serving whim and caprice; stability in minicipal government would disappear.

## POINT V.

**APPELLATE COURT ERRED IN DEFINING WORD "ESTABLISHMENT" AND PLACED ITSELF IN THE POSITION WHERE AN "INDUSTRIAL ESTABLISHMENT" COULD HAVE BUT ONE BUILDING. OVERWHELMING WEIGHT OF AUTHORITY IS CONTRARY TO COURT'S DECISION.**

**(a) Appellate Court Ignored Its Own Prior Pronouncements Upon the Meaning of "Establishment".**

The opinion of the court at Page 13 construes the word establishment "as meaning one one unit, and not all the units in an enterprise".

Only last year on March 1, 1956, however, in *Mitchell v. Bekins,* 231 Fed. 2d 25 at Page 27, this court speaking through Judge Chambers, stated:

> ". . . It does not seem unreasonable to consider the five warehouses, generally in downtown Los Angeles within a limited radius, as one establishment.
>
> Geography may well play quite a role. Probably, if the buildings were to be found scattered in San Diego, Los Angeles, Long Beach, Pasadena, Santa Barbara, Bakersfield, San Bernardino, and Riverside (with central control at one office) the trial court's conclusions would be clearly erroneous.
>
> To this court, an important factor here is that if it were not for financial or capital problems and the necessity of using what one has, it would be quite feasible to conduct, and Bekins probably would conduct, the business of the five warehouses in one central warehouse under one roof."

Similarly, petitioner's apartment business could have been conducted and probably would have been

conducted under one roof had it not been for requirements of Federal Housing Authority and height limitations of the United States Army because of proximity to an airport (R. 163, 342).

In *Aragon v. Unemployment Compensation Commission of Alaska,* 194 Fed. 2d 447 Ninth, C.C.A. 1945, this court dealt with "canning establishments in Alaska at Chignik, Carluk and Bristol Bay. The establishments consisted of canning factories and the premises surrounding them, with quarters for the fishermen and canners, fishing boats and housing for the supplies and equipment of the establishment and their employees." (Page 450 of the Ninth Circuit Court Opinion). The Supreme Court of the United States in affirming in part the decision of the Ninth Circuit Court stated "we conclude that under the circumstances of this case the dispute was 'at the factory, establishment, or other premises' in the sense intended by the Territorial legislature" (329 U.S. 143 at Page 156; 1946). Incidentally, the Ninth Circuit Court and the Supreme Court used the principle of nosciture a sociis, just as we suggest that the court here apply the same principle by linking the word "industrial" with the word "establishment" in construing Schedule C.

Thus, in the only instances where the matter has been brought to the attention of the Ninth Circuit Court of Appeals, this court has ruled that the word "establishment" is defined as Petitioner contends, namely, to include Petitioner's nineteen apartment houses on one functionally integrated tract, physically

proximate to one another and operated as a general unit.

**(b) Dictionary Definition No Help.**

The Court of Appeals relies on Webster's unabridged dictionary in part for the definition of "establishment" (Op. 13). Part of that definition is "the place" where one is permanently fixed for residence or business. The place where petitioner is permanently fixed for business is the site of the apartments concerned in this litigation. Webster's New International Dictionary, Second Edition, is used to support the opposite meaning of "establishment" by the Appellate Division of the Superior Court of New Jersey in *Ford Motor v. N. J. Dept. of Labor,* 71 A. 2d. 727, and by the Court of Appeals of Kentucky in *Snook v. International Harvester Company,* 276 S.W. 2d. 658.

**(c) Appellate Court Errs in Stating That Each Building in Project Is Distinct as to Identity and Operation.**

The Court of Appeals is mistaken in its assertion (at Page 13, Opinion) that "here the identity and operation of each plaintiffs' apartment house is separate and distinct from the others". The identity and operation of each building in petitioner's project is common to the entire establishment. The buildings do not have separate names; they are not managed by different persons. The rent is paid to a common agent; the apartments are let by a common agent. The grounds are contiguous and undivided by dedicated streets. The project has one mortgage; it has posted one utility bond with the City of Anchorage

to cover its electricity consumption in the common areas of all buildings; and the buildings are taxed by the City as one unit.

**(d) Fleming Case Is Not at All in Point.**

The Court of Appeals cites as its only court decision on the meaning of "establishment" a 1941 decision of the District Court for the Eastern District of Pennsylvania, *Fleming v. American Stores Co.,* 42 F. Supp. 511. The quoted sentences from the District Judge's opinion in Fleming should be construed in the light of the circumstances of that case. The question there was phrased by the Judge as follows:

> "What is a 'retail establishment' within the meaning of Section 13(a) (2) of the Fair Labor Standards Act of 1938?
>
> Specifically, is a $33,000,000 chain store organization, employing more than 14,000 workers, with gross annual sales of $115,000,000, which directly and through wholly-owned subsidiaries operates 2,300 retail grocery stores and eleven warehouses in seven states and the District of Columbia, along with food-processing and manufacturing plants, etc., a 'retail establishment'?" [When the Court of Appeals modified this decision in 133 Fed. 2d 840 it pointed out an even greater diversity of operations.]

The court actually is not construing the word "establishment", but as it points out at Page 516, it is determining the legislative intent of the Congress as to what Congress meant by a "retail establishment". It had before it not only rules and interpretive bulletins

of the Wage and Hour Division, but it had the legislative history of the particular section of the Fair Labor Standards Act which, as it points out, had to be strictly construed against the defendant because the chain store involved was trying to claim an exemption through its contention that:

> ". . . The retail establishment of the defendant is the entire business of the defendant including its main offices, its warehouses, its bakeries, its multigraphing plant, its manufacturing operations, its transportation facilities and its repair and machine shops."

Certainly the foregoing case — the only one mentioned by the Court of Appeals — is slender authority for the construction of Schedule C with its reference to "industrial establishments" as well as other establishments!

We have found no case which would even hint that the word "establishment" is limited to a single building or would not apply to petitioner's nineteen buildings devoted to one purpose on one tract of land. All cases found, some of which are hereafter cited, hold that many buildings, even geographically separated are one establishment.

**(e) Word "Industrial" Was Overlooked in Interpreting Schedule C.**

The Anchorage tariff refers to "professional, mercantile, industrial, and other establishments." This is a far cry from "retail establishment." An industrial establishment frequently, if not always, utilizes more

than one building. The everyday observation of the common man even confirms this point.

*Ford Motor Co. v. Unemployment Compensation Board of Review*—(1951) Penn. 79 A. 2d. 121, where it was held that any alleged uncertainty in the meaning of the word "establishment" should be resolved under the doctrine of *noscitur a sociis,* by the words associated with it, such as "factory" and "premises."

In construing Schedule C of the electrical tariff, therefore, the fact that the City used the word "industrial" would indicate that it contemplated situations where more than one building was involved.

*Snook v. International Harvester Company,* 276 S.W. 2d. 658. (Ct. App. Ky.—1955).

*Mitchell v. Bekins Van & Storage Company,* 231 Fed. 2d. 25, 26. (9th C.C.A.—March 1, 1956).

**(f) Appellants in Effect Conceded District Court Correctly Defined Establishment.**

Appellant in the face of the following cases, which represent the overwhelming weight of authority, did not even argue in its briefs that petitioner's apartment houses were not an establishment within the meaning of the tariff.

The overwhelming weight of authority defines "establishment" as the District Court defined it:

*Spielmann v. Industrial Comm.* (1940) Wis., 295 N.W. 1;

*Chrysler Corp. v. Smith* (1941) Mich., 298 N.W. 87, 135 ALR 900;

*Snook v. International Harvester Company,* Ky. (1955) 276 S.W. 2d. 658;

*Mitchell v. Bekins Van & Storage Company,* 231 Fed. 2d. 25, 26 (9th C.C.A.—March 1, 1956);

*Matson Terminals v. California Employment Comm.* Cal. (1944) 151 P. 2d. 202;

*Claim of Lasher,* 111 N.Y.S. 2d. 356, New York Sup. Ct. App. Div. 1952;

*Phillips v. Walling,* 324 U.S. 490; 89 L. ed 1095 (1945);

*Philadelphia Water Company v. Pennsylvania Public Water Commission,* (1949) Pa. 64 A. 2d. 500;

28 A.L.R. 2d. beginning P. 324.

*Spielman v. Industrial Comm.* (1940) Wis. Sup. Ct. 295 N.W. 1. An automobile body manufacturing plant and a manufacturing plant for auto parts, though forty miles apart, were held to constitute an establishment, the Court stressing the place of employment rather than singleness of management and product, and the Court basing the decision on "the physical proximity, functional integrality, and general unity."

*Chrysler Corp. v. Smith,* (1941) Mich. 298 N.W. 87, 135 A.L.R. 900, held that the main automobile plant and other plants located in nearby areas, which were functionally integrated and highly synchronized with the main plant, constituted one "establishment"

within the meaning of the statute. Thus, various business plants, united under a single ownership although separate in place, were held to be one establishment. The Court applied the test of "the physical proximity, functional integrality and general unity" of the nine plants of the Chrysler Corp. located in Michigan all within eleven miles of the main plant.

*Snook v. International Harvester Company,* Ky. (1955) 276 S.W. 2d. 658, defined the unqualified word "establishment" as used in the Kentucky Unemployment Compensation statute. The company in Kentucky had a coal mine at Benham, a sales office in downtown Louisville, and the Louisville Works (a farm equipment factory) in another section of Louisville. The foundry and machine shop of the Louisville Works were housed in separate buildings. The Court said, "if the foundry and machine shop are different establishments, appellants are entitled to unemployment compensation; otherwise not." The Court held that the two were one establishment because:

(a) The two are functionally integrated.

(b) There is a general unity both in the operation of the plant and in the nature of the employee.

(c) Their physical proximity is such as to constitute a single unit.

In *Mitchell v. Bekins,* 231 Fed. 2d. 25 (9 C.C.A. March 1, 1956) the 9th Circuit Court of Appeals, in a Fair Labor Standards Act case, held that the five scattered Bekins Storage warehouses in downtown Los Angeles were one "establishment." The buildings were separated and were neither contiguous nor widely scattered. The proprietor's unit of operation and control were considered, plus his natural business policy.

In *Matson Terminals v. California Employment Commission* (1944 Cal.) 151 Pacific 2d. 202, the term "establishment" was applied to longshoremen assigned to various employers, and the word was held to include the places of employment, namely, the various docks covered by the contract, where the longshoremen customarily worked.

In *Claim of Lasher,* New York Sup. Ct. Ap. Div. 1952, 111 N.Y.S. 2d. 356, the Lackawanna New York Bethlehem Steel Company plant was held to be one "establishment." Obviously, this enormous plant was made up of many buildings.

In *Phillips v. Walling,* 324 U.S. 490; 89 L. ed 1095 (1945) the U.S. Supreme Court, in a Fair Labor Standard Act case, held that when Congress used the word "establishment" it used it as it is "normally used in business and in Government — as meaning a distinct physical place of business." The

Court said in footnote 6 at Page 496 of 324 U.S. that:—"Prior to the adoption of the Fair Labor Standards Act the term 'establishment' was used in the sense of physical place of business by many census reports, business analyses, administrative regulations, and state taxing and regulatory statutes."

In *Philadelphia Water Company v. Pennsylvania Public Water Commission,* 1949 Pa. 64 A. 2d. 500, or the "Colonial Gardens Case," the tariff made use of the words "commercial" and "establishment," and the court held that the eleven buildings on one plot of ground, with one mortgage, the project being taxed as one unit, constituted a single establishment. The Colonial Gardens Project would have met the tests of "functional integrality, physical proximity, and general unity." The Colonial Gardens Project would likewise have been considered one "place of business."

In 28 *A.L.R.* 2d., beginning at Page 324, is an exhaustive note dealing with "establishment, factory, or other premise." In this note are collected all of the "establishment" cases and the various tests used to define the meaning of the term "establishment" are set out and discussed in full.

In the Instant case, Petitioner's place of business was the Richardson Vista unified tract upon which were its nineteen apartment

buildings; it had no other place of business. Thus, the "place of business" test of the Supreme Court and other courts is met. The test of "physical proximity, functional integrality, and general unity" is certainly met by nineteen apartment buildings on twenty-three contiguous acres, managed by a common manager, heated by a central heating plant, taxed as a unit, mortgaged as a unit, owned by one corporation, and devoted to the sole purpose of renting apartments to tenants. The buildings are proximate, the business is functionally integrated, and completely unified.

**(g) City Could Have Changed Tariff Had It So Desired.**

As a matter of fact, since the inception of this action in January of 1952, all that the City of Anchorage would have had to do to make proper its method of billing petitioner was to eliminate the word "establishment" from its various tariffs and make it clear that the rates applied to each "meter," or each "service drop," or each "building."

The City, contrariwise, however, in its Schedule C, applies its consumption rates to establishments, but its minimum charges to meters. The last line of Schedule C is "minimum monthly charge per meter," not per establishment (R. 12).

In fact, the decree [not judgment] entered in favor of petitioner purports to restrain the City only "from applying its rate schedules separately to each build-

ing within the establishment owned by plaintiff, Richardson Vista Corporation unless such practice be sanctioned by duly promulgated and legally sufficient ordinance or regulation . . . " (R. 61).

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**POINT VI.**

**APPELLATE COURT ERRED IN BELIEVING CITY MANAGER HAD INTERPRETED TARIFF.**

This Court, in its opinion at Page 14, suggests that the City Council properly delegated to the City Manager the right to interpret Schedule C. The provision of the Anchorage City Code cited above in Point IV, setting forth the requirements of publication of such rules and regulations as might be adopted, was not brought to the attention of this Court because the point had not been raised by appellant.

Further, it is fundamental that the situation which must be considered is that prevailing at the time the complaint herein was originally filed. The Anchorage City Manager at that time, Mr. Sharp, did not purport to interpret the word "establishment" as relating to a single service drop. And the City Council, in refusing to afford relief to petitioner, had predicated its refusal upon the City's need for additional revenue and upon some alleged prohibition in the National Electric Code. (R. 191, 192, 194, 216, 402, Rich. Vista Brief, P. 11). The refusal was not based on policy, or practice, despite the careful wording of Ex. K.

Exhibits 4 and 5 disclose that the City was not relying on policy, but that in its efforts to refuse peti-

tioner justice under Schedule C, the City was invoking a strained interpretation of a provision of the National Electric Code.

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**POINT VII.**

**APPELLATE COURT OVERLOOKED SIGNIFICANT PORTIONS OF LAND TITLE CASE: LAND TITLE FACTS ARE NOT EVEN CLOSELY RELATED TO OUR FACTS.**

The Court of Appeals in its opinion at Page 8 relies in part upon *Land Title Bank and Trust Company v. Pennsylvania Public Utility Commission.* The Court overlooked *Philadelphia Water Company v. Pennsylvania Public Water Commission,* hereafter called the "Colonial" case, (64 Atlantic 2d. 500) which pointed out that in Land Title diversity of ownership was involved, while in the *Colonial* case all buildings belonged to one owner and there was but one consumer. The *Colonial* case is in all respects like the Richardson Vista Corporation situation, and was discussed beginning at Page 9 of Richardson Vista Corporation's brief herein.

In the opinion rendered by this Court, the second sentence of the paragraph at bottom of Page 8 and top of Page 9 is not at all clear; the words "public policy" do not appear in the *Land Title* case, nor was public policy an issue in that case.

The customer in Land Title wanted to wholesale or resell electricity to tenants, a practice universally prohibited.

The Court did not quote the distinguishing facts from the opinion in Land Title. Those distinguishing facts are set out in full in Point X hereafter in this petition.

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**POINT VIII.**

**THE COURT OF APPEALS OVERLOOKED CONVINCING EVIDENCE THAT THE CITY INTENDED TO DEPART FROM THE PRACTICE EXISTING BEFORE THE REPEAL OF ORDINANCE 55.**

The Court, at Page 8, mistakenly cites Judge Folta's opinion as stating that "it appeared that the City officials were unaware of the repealing effect of Ordinance 283 . . . " As a matter of fact, Judge Folta said the opposite, namely, that the denial by the City council of relief for plaintiff "would appear to indicate knowledge of the repeal." (R. 48).

In any event, the Court of Appeals, in its opinion, states that to overcome the practice which had been followed by the City for thirty years "there should be some definite proof of the City's intention to depart therefrom." (Op. P. 8).

The proof of the City's intention to depart therefrom, if the express repeal of Section 24 of Ordinance 55 will not suffice, is found in Schedule C which was enacted shortly after the repeal. The use of the word "establishment" in Schedule C, especially when that word is linked with "industrial," clearly indicates that after the repeal of Ordinance 55 the City intended its electrical rate scale to apply where the normal attributes of an establishment are present — con-

tiguity, common ownership, one consumer, and the other criteria set out in the *Colonial* case cited above.

The Court of Appeals, on Page 8, likewise assumes that the City's rate schedule is silent on the subject of combined billings. Petitioner submits that the very use of the word "establishments" speaks loudly. The City could easily have used the word "building" or "service drop" or "meter" if that is what it intended. The language of the last line of Schedule C is noteworthy. Where, when the City in that schedule refers to actual consumption of electricity, it uses the word "establishments," still at the last line, where it is referring to a minimum monthly charge, it uses the phrase "minimum monthly charge per meter," not per establishment. (R. 12, Ex. C).

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**POINT IX.**

**APPEALS COURT MISINTERPRETS PETITIONER'S POSITION RESPECTING ADOPTION OF ORDINANCE 283.**

Petitioner's contention has apparently not been made clear to the Court of Appeals. At Page 8 in its opinion, the Court states that plaintiffs contend the adoption of Ordinance 283 [of which Schedule C was not a part, although the Court of Appeals so states] amounted to an abandonment of a practice which had existed for thirty years. Petitioner does not so contend. During the twenty-four years that Ordinance 55 was in effect, the City did, of course, comply with its own law. The repeal of Ordinance 55 left a vacuum.

At that time there was no established practice, policy, rule or regulation. The vacuum was filled when the City adopted Schedule C and used the word "establishments" linked to the word "industrial" and contrasted to the use of the words "per meter" in the same schedule.

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**POINT X.**

**APPEALS COURT CITES FIVE CASES SUPPOSEDLY INVOLVING LEGALITY OF COMBINED BILLING WHEN TARIFFS WERE SILENT ON THE SUBJECT; ALL FIVE HOWEVER INVOLVED DEFINITE, ARTICULATE TARIFFS; ALL REPRESENT ENTIRELY DIFFERENT FACTUAL SITUATIONS.**

**(a) Land Title Case Distinguished; Tariff Present, Wholesaling Present, Diversity of Ownership Present, Diversity of Possession Present, Tracts Apparently Not Contiguous.**

At Page 8, the Opinion of this Court states that a majority of the authorities in passing on the issue "have held that where a Schedule is silent on the subject, the combined billing practice is prohibited." The Court then cites the *Land Title Bank* case and seems to place chief reliance for reversal on this decision. But in Land Title the schedule was not silent. As appears at Page 9 of the opinion, in Land Title, "the commission had a rule to the effect that 'unless otherwise stipulated, the rates named in the tariff for each class of service are based upon the supply of the service to one entire premise through a single delivery and metering point. Separate supply for the same customer shall be separately metered and billed' ". This case did not involve single ownership, as the Court

pointed out subsequently in the *Colonial* case, and which fact of manifold ownership is expressly stated in Land Title.

Further, this Court may not have realized that Land Title involved an application to wholesale electricity, apparently to tenants of apartments and buildings, not just in connection with common areas where the electricity was furnished by the project owner.

This Court, when at Page 9 of its opinion it quoted from Land Title, did not take into account the three paragraphs of the Land Title opinion immediately preceding the quoted portion, which paragraphs indicate the great discrepancy between the factual situation in Land Title and the factual situation which confronts petitioner.

> "As a result of the transactions hereinbefore recited, some of the dwellings now are held and occupied by non-defaulting certificate owners; some are occupied as tenants, respectively, of four unrelated building and loan associations, mortgagees-in-possession; some are occupied by tenants of a building and loan association claiming ownership through the settlor of the trust and some are occupied as tenants of a fifth building and loan association. Also, by reason of the same, appellant functions as trustee under the trust as to the certificate owners, as a rental agent severally for each of the four mortgagees-in-possession and as a rental agent for the building and loan associations, not mortgagees-in-possession.
>
> "Because of the physical, structural and geographic characteristics of the development and of the manifold ownership, possessory and occu-

pancy interests pertaining thereto, intervening appellee declined to treat the 264 dwellings or the appellant in its diverse relationships thereto, as a single customer unit for single point electric service.

"Quoting from the report of the commission: 'Taking into consideration all the evidence presented, that the Certificate Holders are the 'equitable owners'' and in many instances the occupants of each apartment, that the trustee's duties are limited and not discretionary, that no profit was contemplated, that the whole group of apartment house dwellings in general does not have common conveniences, that for all practical considerations each is a separate and distinct residence having all the necessary facilities and being entirely complete in itself, it is our opinion that this association is not such a bona fide business unit as would entitle it to come within the wholesale Power and Light Classification of respondent's tariff.''

**(b) Raceland Distinguished; Ordinance Clear (non-silent) in Raceland.**

Neither was the "schedule silent" in the next case cited by this Court, *City of Raceland v. Colvin,* 95 S.W. 2d. 1113 (Op. 10). The City ordinance provided "no meter shall be used to furnish more than one building." The City regulations require a deposit of $5.00 for each building. The owner refused to make more than one $5.00 deposit. Three buildings were involved; there were two different possessory interests, another ownership interest; and the applicable regulations specified "building" rather than "establishment."

**(c) American Water Works Distinguished; Wholesaling Present; Express Tariff Applicable to Buildings Was Present.**

In *United States v. American Water Works* (Op. 10), the 1889 trial court considered a situation where a special tariff prescribed a rate for each different type of building and the consumer tried to aggregate all types of buildings for a single application of the rate. Thus the tariff made each building a consumer. Some 75 to 100 tariff provisions existed which were not quoted by the Court. The decision has no application to the present matter.

In a note found in 61 L.R.A. at Pages 111-112, appears the following digest of the American Water Works holding, which also indicates that the tariff made each building a consumer:

> "A water company authorized to charge specified rates for buildings of different characters, and according to the number of rooms in dwelling houses, is not required to supply to a military reservation, comprising dwellings for officers, hospitals, warehouses, and barracks as a single consumer. *United States v. American Waterworks Co.*, 37 Fed. 747."

The Court of Appeals at Page 10 of its opinion quotes further language from the 1889 decision concerning common ownership of 20 to 30 residences which are rented to various tenants. To permit conjunctive billing in such a case would either permit the owner of the residences to wholesale the utility or would indeed be discriminatory of other tenants. We strongly suspect that among the 75 to 100 other regulations was one prohibiting wholesaling, because the

Court said at Page 750 that to decide otherwise would permit one to "contract for all the water from defendant and subcontract it to various consumers in the City." Note that in our case the only regulation, rule, or ordinance was Schedule C.

**(d) New York Public Utility Cases Distinguished; Express (Non-Silent) Tariffs Existed.**

In the next two cases cited by this Court, both New York Public Utility Commission hearings (Op. 10 and 11) there was no silence as to conjunctive billings. Express provisions governed when and how the practice could be followed, and the Board hearings were interpretations of existing rules.

The earlier of these, *Realty Supervision Company v. Edison Electric,* Public Utility Reports 1917B, P. 962, involved an application to the Utility Company for a wholesale rate upon various stores rented from the applicant by various tenants. The application was made under a tariff providing for combined billing where common ownership existed and the buildings were not more than 100 feet apart. The Commissioner refers to his own prior dissenting opinion, and it is that dissenting opinion which is quoted by this Court at Pages 10 and 11 of its decision. The Commissioner states that he believes "the Brooklyn Company has done well to cancel this rider".

This 1916 decision of the New York Public Service Commission is not an adjudication before a tribunal; it involves an effort to wholesale electricity to stores operated by different owners; it is infested not only by a peculiar and specific tariff but by the rules and regulations of the Commission. It certainly is no au-

thority either for or against petitioner's contentions in the instant case.

The second Utility Commission Case, *New York Edison Company et al.,* 10 Public Utilities Reports, N.S., 244, cited at Page 11 of the Appellate Court's Opinion is an "investigation of electric rates; Commission's views expressed on proposed rates". In its twenty-page dissertation, the Commission engages in the discussion cited by this Court and continues, to point out that under the proposed schedules the owner could group all the properties he controls so long as two of them are not more than 100 feet apart. The Commission opines that such a tariff provision is not justified. Again there is no adjudication before a tribunal; no similarity of facts; and a tariff provision far from silent deals with the subject of combined billings.

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**POINT XI.**

**OTHER MISTAKES.**

Various mistakes have occurred in the opinion of this Court. Some of them may be immaterial, but petitioner respectfully invites the Court's attention to the following if for no other purpose than to make a clear and legible opinion, should it be published:

(a) The Court, at Page 7, line 6, of the opinion, refers to the "judgment". It ignores the "decree" entered by Judge McCarrey and appearing at Page 59 of the record.

(b) The Court refers to Ordinances 282 and 293 at various places in the opinion, when Ordinance 283 is intended.

(c) The word "but" is included after the word "establishments" in line 4 of Schedule C at Pages 5, 12, and 14; the word "but" does not so appear in Schedule C.

(d) The word "combined" is not found in the prayer of the complaint, although at Page 3 of the opinion, the Court indicates that it is.

(e) The word "owned" is omitted from the quotation at the top of Page 5 of the opinion, following the word "though", although the word is included in Judge Folta's opinion.

(f) The word "building" is omitted following the word "individual" in line 6 of Page 6 of the opinion, although the word is included in the District Court opinion.

(g) The words "combined metering" are substituted for the words "combining meter" in line 23, Page 6 of the opinion, although the District Court opinion uses the latter words.

(h) The words "of the sliding benefits" should be omitted from line 33 of Page 6 of the opinion for obvious reasons.

(i) The words "and substantial" should be inserted following the word "reasonable" in line 17 of Page 7 of the opinion because they appear in the judgment entered by Judge McCarrey.

(j) Schedule C was no part of Ordinance 283 as indicated in lines 10 and 11 of Page 8 of the opinion. (See Ex. 10.)

## CONCLUSION.

In conclusion, since it has been uncontrovertibly shown that Section 24 of Ordinance 55 was not inadvertently repealed, or even repealed by implication, but on the contrary was expressly repealed by section number, the entire effort of the City to avoid applying its published tariff to petitioner's situation can rest on only one point, namely, whether or not the common areas of petitioner's apartment buildings are an establishment. The authorities are so overwhelming in supporting the District Court ruling on this point that petitioner should have a rehearing by the Court of Appeals.

Dated at Anchorage, Alaska, this 25th day of April, 1957.

JOHN S. HELLENTHAL,
RALPH H. COTTIS,
HELLENTHAL, HELLENTHAL & COTTIS,
*Attorneys for Appellee and Petitioner Richardson Vista Corporation.*

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Note No. 1: Appellee, Panoramic View Corporation, did not see fit to petition for rehearing, apparently relying on petitioner to undertake this burden. Should rehearing be granted, elementary justice would dictate that appellee, Panoramic View Corporation, be permitted to participate in the rehearing along with petitioner.

Note No. 2: Underlining and parenthetical matter in the foregoing petition has been supplied by petitioner unless otherwise indicated by the context. Material included between crotchets represents the opinion of petitioner.

Note No. 3: In reviewing the District Court Record it is not always apparent that a substantial portion of the record reflects a pre-trial conference rather than the trial itself. Pages 81 to 156, and pages 39, 40 and 41 constitute the pre-trial conference.

CERTIFICATE OF COUNSEL

I hereby certify that I am of counsel for appellee and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated at Anchorage, Alaska, this 25th day of April, 1957.

JOHN S. HELLENTHAL,
*Of Counsel for Appellee and Petitioner.*